UXB International, Inc. *and* General Teamsters, Warehousemen & Helpers Union, Local No. 890, affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 32–CA–14205, 32–CA–14319, 32–CA–14377, and 32–RC–3935

June 11, 1996

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS BROWNING, COHEN, AND FOX

On September 8, 1995, Administrative Law Judge Jay R. Pollack issued the attached decision. The Union filed exceptions with a supporting brief, the Respondent filed cross-exceptions with a supporting brief, and a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, UXB International, Inc., Chantilly, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[3]

Substitute the following for paragraphs 2(a) and (b).

''(a) Within 14 days after service by the Region, post at its Fort Ord, California United States Army Corps of Engineers project copies of the attached notice marked 'Appendix.'[9] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. During the pendency of these proceedings, the Respondent closed the facility involved in these proceedings, Respondent shall therefore duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 1994.

''(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.''

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots has been cast for General Teamsters, Warehousemen & Helpers Union, Local No. 890, affiliated with International Brotherhood of Teamsters, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate.

Valarie Hardy-Mahoney, Esq., for the General Counsel.
Paul Johnson, Esq. (Rochester, Wong, Shepard & Johnson), of San Francisco, California, for the Respondent-Employer.
Kirsten Snow Spaulding, Esq. (Beeson, Tayer & Bodine), of San Francisco, California, for the Union-Petitioner.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Salinas and Oakland, California, on 14 days, beginning March 14 and ending May 1, 1995. On September 13, 1994, General Teamsters, Warehousemen & Helpers Union, Local No. 890, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union) filed the charge in Case 32–CA–14205 alleging that UXB International, Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). That charge was amended on November 29, 1994. On November 8, 1994, the Union filed the charge in Case 32–CA–14319 against Respondent. Thereafter on November 30, 1994, the Union filed the charge in Case 32–CA–14377. On November 29, 1994, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent in Case 32–CA–14205 alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On January 25, 1995, the Regional Director issued a consolidated complaint against Respondent in all three cases. Respondent filed timely answers to the complaints, denying all wrongdoing.

On August 29, 1994, the Union filed a petition in Case 32–RC–3935 seeking to represent Respondent's employees at its Fort Ord, California project. An election was held by se-

[1] In adopting the judge's dismissal of the complaint allegation that the Respondent unlawfully terminated James Thoren, we rely solely on his finding that the Respondent did not terminate Thoren because of any protected concerted activity in which he might have engaged. Accordingly, we find it unnecessary to pass on the judge's alternative finding that Thoren's termination was lawful because he was a statutory supervisor.

In the absence of timely objections, we find it unnecessary to pass on the judge's statement that the Employer's conduct would have constituted grounds for setting aside the election if the Union had not received a majority of the votes cast.

[2] Subsequent to the hearing, the Respondent ended its United States Army Corps of Engineers project at Fort Ord, California, where the unlawful conduct occurred. Accordingly, we shall modify the recommended Order by requiring that Respondent mail copies of the notice to its former employees.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

cret ballot by mail and manual ballot between November 7 and 21, 1994. The results of the election were 32 votes cast for representation by the Union and 30 votes against representation. There were also nine challenged ballots. On January 26, 1995, the Regional Director issued a report on challenged ballots and notice of hearing. The hearing on the nine challenged ballots was consolidated with the unfair labor practices hearing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Virginia corporation with offices and a principal place of business located in Chantilly, Virginia, where it is engaged in the business of ordinance and explosive waste disposal. During 1994, Respondent received revenues in excess of $50,000 pursuant to a contract with the United States Army Corps of Engineers. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Beginning in July 1994, Respondent was engaged in the detection and demolition of unexploded ordinance at Fort Ord, California, pursuant to a contract with the United States Army Corps of Engineers. In August, Respondent's employees circulated a petition complaining about wages and benefits. The petition signed by all of Respondent's employees was faxed to Respondent's president and to certain of Respondent's competitors. Shortly thereafter, Respondent's employees signed union authorization cards and a petition was filed by the Union in the representation case on August 29. As stated earlier an election was held in November. The complaint alleges that Respondent, during the election campaign, created the impression of surveillance of its employees' union and protected concerted activities, threatened job loss and impaired future job prospects and blackballing of employees, interrogated an employee as to how he voted in the representation election, and restricted employees from discussing information concerning their medical and dental insurance. Further, the General Counsel alleges that Respondent discharged UXO Supervisor James Thoren because of his protected concerted activities in helping to prepare and circulate the employee petition concerning wages and benefits. In the representation case, the Union contends that Thoren and six employees who were laid off on October 6, 1994, were eligible to vote in the election and that their ballots should be opened and counted.[2] Finally, the Union contends that two employees who were working for Respondent at Fort Ord, but pursuant to a contract with an environmental contractor did not share a community of interest with the bargaining unit employees and should not be eligible to vote in the election.

Respondent denies that it violated the Act. Respondent contends that Thoren was a supervisor within the meaning of the Act and, therefore, not protected by Sections 7 and 8(a)(1). Further, Respondent contends that it discharged Thoren for engaging in safety violations without regard to any protected concerted activities. Respondent argues that the six laid-off employees had no expectation of returning to the bargaining unit at the time of the election. Finally, Respondent contends that the two employees working pursuant to the environmental contract shared a community of interest with the bargaining unit employees and should be included in the appropriate unit.

B. *The Termination of James Thoren*

1. Facts

As mentioned above, Respondent is engaged in the detection, collection, and disposal of unexploded ordinance at Fort Ord, California, under a contract with the United States Army Corps of Engineers (the Corps). Prior to being hired for the Fort Ord jobsite, James Thoren worked for Respondent at approximately 10 jobsites over the past 7 years. Thoren was hired on July 5, 1994, as a UXO supervisor for the Fort Ord project. For this jobsite there were 10 teams of 4–5 UXO specialists, each led by a UXO supervisor. Thoren was assigned as the UXO supervisor for the demolition team. All teams including Thoren's team were assigned to locate and mark ordinance. In addition to these duties, the demolition team was assigned to dispose of any live ordinance found during the workday. Although Thoren was paid the same wages as the other UXO supervisors, his position as leader of the demolition carried more prestige and was considered first among equals. The UXO supervisors earned 18 percent more than the UXO specialists and 60 percent more than the laborers on their teams.

In addition to the 10 UXO supervisors, there was a senior UXO supervisor, James Kerr, and a project manager, Lee Dickson, to whom all the UXO supervisors reported. Although Dickson was the top managerial employee on the jobsite, he was not trained in the disposal of explosives. The parties stipulated that Kerr and Dickson were supervisors within the meaning of the Act. In the representation case, the Regional Director found that the UXO supervisors were not statutory supervisors and included them in the bargaining unit. Initially, the Employer filed exceptions to the Regional Director's preelection decision but later withdrew those ex-

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] The complaint alleged that the six employees were unlawfully selected for layoff in violation of Sec. 8(a)(3) and (1) of the Act. However, based on the trial evidence, the General Counsel withdrew that allegation of the complaint.

ceptions. As mentioned above, Respondent contends that Thoren was a supervisor within the meaning of the Act.

Kerr and Dickson worked under the direction of James Anelle, the Corps' representative on the jobsite. During the week of August 1, 1994, Anelle was away from the project and was temporarily replaced by another representative from the Corps, Greg Bayuga. On August 1 and 2, Bayuga found violations of the work plan that gave rise to Thoren's removal as leader of the demolition team.

On August 1, Bayuga observed Thoren and one of his team members, James Moraitis, working in the woods without protective coveralls. The protective coveralls were required by the project work plan because of a serious problem with poison oak. Bayuga reported the violation to A. R. Smith, one of the two safety officers on the jobsite.[3]

On the morning of August 2, at daily safety meetings the UXO supervisors and UXO specialists were advised that they were required to wear the protective coveralls in the field. According to Thoren he asked whether coveralls were required in areas where there was no poison oak and Kerr answered that if there wasn't any poison oak around, he didn't care if the coveralls were worn.[4]

Later that day, while working in an area devoid of poison oak, some employees on Thoren's team asked if they could remove their coveralls. Based on his conversation with Kerr, Thoren gave the employees permission to remove their coveralls. Bayuga observed this violation of the work plan.

Later that afternoon, Bayuga observed the demolition procedure. After the detonation, Thoren radioed to Kerr that he was going to the demolition range to inspect the detonation site. Kerr said, ''Okay.'' Under the work plan, Thoren was required to wait 5 minutes before entering the demolition range. However, Thoren had never observed the ''five minute'' rule and had never had this violation discussed with him by Kerr or Anelle. On this date, Thoren waited only about 3 minutes before entering the demolition range with his team. Bayuga observed this violation as well.

At the end of the day, Bayuga approached Kerr and told him that he had again observed the demolition team without coveralls. Bayuga also said that the demolition truck did not have a sufficient number of placards stating that the truck carried explosives and that the demolition team had violated the rule requiring a 5-minute waiting period before entering the demolition range. Bayuga showed Kerr where the ''five minute rule'' was in the project work plan.

Bayuga wrote up a ''ticket'' stating that Respondent had committed four violations of the work plan. In addition to the coveralls, safety placards, and 5-minute rule violations, Bayuga wrote up the demolition team for dragging some wire fuse through sand. Bayuga wrote that he was suspending the demolition operation until further notice.

On the morning of August 3, the demolition team did not go into the field as usual but instead was given a class to review the safety requirements of the project work plan. The demolition team was then allowed to resume its normal work schedule. Thus, although Bayuga had suspended the demolition operation, the period of the suspension was during a morning when no demolition would have taken place in any event.

Thoren was removed as supervisor of the demolition team and reassigned as supervisor of another team. Moraitis was discharged for not wearing coveralls for the second consecutive day. Thoren told Kerr and Dickson that he had given Moraitis permission to remove his coveralls and that if Moraitis were discharged, Thoren would quit. Dickson and Kerr told Thoren that they did not want him to quit. Dickson suggested that Thoren call Gerry Kitzmiller, a vice president for Respondent in Virginia. Thoren spoke with Kitzmiller and said that he had given Moraitis permission to remove his coveralls and that if Moraitis was fired, he would quit. Later that day, Kitzmiller told Thoren that Moraitis could remain on the job. Thoren then went to the motel where Respondent's employees stayed and drove Moraitis back to the project.

On August 6, Thoren wrote a letter to Richard Dugger, Respondent's president, protesting his removal as supervisor of the demolition team. Thoren argued that everything he had done was with the approval, express or implied, of Kerr and Anelle. Dugger faxed Thoren a response on August 8, stating that Respondent would investigate the matter and determine whether any additional corrective action would be warranted.

During the following week, Thoren's team was assigned to work in an area infested with rats' nests. Thoren was concerned about the Hanta Virus that is transmitted from exposure to rat urine and feces. Thoren went to Kerr and requested protective equipment including high filtration gas masks. Thoren obtained more information about the Hanta Virus and then told his team members that they should obtain a baseline blood test before working in the contaminated area. Thoren informed Kerr that his team would not work in the area without a baseline blood test. Kerr said that Respondent would not pay for the tests and Thoren answered that his team would not work in the area. Kerr gave the work to the back hoe team. However, this team also refused to do the work without the baseline blood test.[5]

Pursuant to the investigation mentioned in Dugger's August 8 letter, on August 11, all the UXO supervisors were asked to write down what they were told about the wearing of coveralls. The letters indicated that Kerr had not given a clear indication that coveralls had to be worn irrespective of the danger of poison oak. Respondent's officials did not hold Thoren responsible for the coverall violation. Respondent's witnesses stated that no further investigation of the 5-minute rule or placard violations was necessary because Thoren had admitted those violations in his August 8 letter.

On August 15, Fred Pasteris, a UXO supervisor, approached Thoren and showed him a draft of a letter that Pasteris had been discussing with employees on his team. The letter protested Respondent's wages and benefits and argued that Respondent's competitors provided better wages

[3] The parties stipulated that the safety officers were not statutory supervisors and were eligible to vote in the election.

[4] Kerr, still employed by Respondent at another project, did not testify. Accordingly, I credit Thoren's version of their conversation.

[5] There was a great deal of evidence presented that all of the employees were seriously concerned about the Hanta Virus. The employees were concerned about the risk of the Hanta Virus and wanted more information and better protection against the virus. Respondent had an industrial hygienist meet with the employees to discuss the virus and set safety standards for working in the infected areas. The evidence reveals that all the employees complained about the risk of the Hanta Virus and wanted more information and better protection against the virus.

and benefits. Thoren discussed the letter with Pasteris and suggested some changes. On the morning of August 17, Pasteris asked the UXO supervisors to sign the letter. Thereafter, Pasteris asked the UXO specialists to sign the letter. With the exception of UXO Supervisor Gary Cole and Project Manager Dickson, every specialist and supervisor on the job, including Kerr, signed the letter. Pasteris' signature was the first signature below the text of the letter. That evening the letter was faxed to Respondent's headquarters in Virginia and to certain of Respondent's competitors. The fax was sent from Thoren's fax machine and bore the identifying caption ''Jimmy T.'' Thoren's signature was the fourth signature on the petition.

Dugger received the fax on August 18 and was very angry that information regarding Respondent's wages and benefits had been faxed to his competitors. Dugger discussed the letter with Kevin Lombardo, a vice president. Lombardo spoke by telephone with Gary Cole and learned that the letter was authentic and that Pasteris had written and circulated the letter. Cole told Lombardo that the letter did not show that courtesy copies were going to be sent to Respondent's competitors. Cole stated that the indication for courtesy copies must have been added after the employees had signed the letter. On August 25, Dugger wrote the employees a letter stating that the employees behind the letter were misguided and that Dugger specifically knew who had authored and sent the letter.

On August 22, Respondent's vice presidents recommended to Dugger that Thoren be discharged for violating safety procedures, specifically violating the 5-minute wait rule and failing to properly placard the demolition truck. Dugger decided to discharge Thoren and on August 24 Dickson presented Thoren with a termination letter. Dickson told Thoren that he was upset at the decision and that he had told Respondent that it was wrong. Dickson, in signing the termination letter, indicated that he was doing so pursuant to orders.[6]

In early September, Kerr was transferred to another jobsite at the same rate of pay. However, Kerr went from supervising Respondent's largest job to a position where he was supervising only himself. Kerr was replaced as senior UXO supervisor by Robert Diekmann. Respondent's witnesses admitted that Kerr's transfer was based on the need to have a stronger and more experienced senior supervisor rather than because of the safety violations of August 2.

Lombardo and Dugger testified that the August 2 ticket was the first and only shutdown of a demolition crew by the Corps in Respondent's history. Bayuga produced 21 additional tickets issued to Respondent, 5 for safety violations. The five safety violations all occurred after Thoren's dismissal. None of the employees involved were discharged, although in one case the investigation was not completed at the time the record in this proceeding closed. Respondent's records did reveal that two employees were discharged for safety violations and one employee resigned after a safety violation. These violations were not as serious as those charged to Thoren.

Respondent contends that Thoren was discharged because of the violations that occurred on August 2. Thoren's letter of August 6 admitted that he had violated the 5-minute rule and had improper placarding on his truck throughout his employment. On August 8, Dugger wrote Thoren stating that he had assigned Mike Donovan to further investigate the matters raised by Thoren. Donovan was away on military reserve duty that week. Prior to receipt of the employee petition, Respondent sought information from the supervisors regarding what Kerr told them regarding the wearing of coveralls. The statements from the UXO supervisors were received in Respondent's offices in Virginia on August 18, the same day as the employee petition.

Dugger, Kitzmiller, and Lombardo all testified that on August 18, Kitzmiller, Donovan, and Lombardo recommended that Thoren be terminated. All three testified that they held Thoren, as supervisor of the demolition team, responsible for violating the safety rules. Because Kerr had not been clear about the coveralls, they did not hold Thoren responsible for that violation. Dugger concurred with the recommendations of the others and Dickson was directed to discharge Thoren.

Respondent argues that it had no animus against the employees who had signed the petition. As mentioned above, with one exception all employees and UXO supervisors had signed the petition. On October 6, when seven employees were laid off, Fred Pasteris volunteered to be laid off in place of employee Dan Poundstone. Although Respondent knew Pasteris was the author of the employee petition, Respondent's supervisors declined the offer because ''we didn't think it was a good idea.'' Respondent kept Pasteris on the job because its managers wanted Pasteris to supervise a team of laborers. Safety Officer A. R. Smith, who also signed the petition, was later promoted to senior UXO supervisor.

Respondent argues that it had no animus against Thoren for raising the Hanta Virus issue. When Thoren gave Steve Parker, safety officer, information about the virus, Parker thanked Thoren. The evidence shows that Respondent was concerned about the safety problems caused by the rats' nests. When Thoren gave information about the virus to Kerr, Kerr told employees to leave the rats' nests alone until Respondent could get its industrial hygienist to look at the situation. The Employer did have an industrial hygienist visit the project, speak to the employees, and make recommendations regarding working in the area of the rats' nests. There is no evidence that any employee was disciplined or retaliated against for raising this issue. Just as the petition was signed by all the employees the Hanta Virus issue was discussed by all the employees. The evidence leads me to conclude that Respondent considered the employee concerns about the virus as legitimate and took reasonable steps to deal with the problem. There is no evidence that Respondent harbored animus against employees for raising this issue.

[6] The General Counsel presented evidence that Bill Blatt, a vice president for Respondent, contacted Bayuga a month before the hearing asking that Bayuga write a letter supporting the discharge of Thoren. Bayuga refused to do so. The fact that Bayuga, not an employee or agent of Respondent, would not have discharged Thoren is irrelevant to the question of whether Thoren's discharge was motivated by unlawful considerations. In Bayuga's opinion, Kerr should have been held responsible for the safety violations. However, the question is Respondent's motivation for the discharge. Thus, if Respondent was not motivated by unlawful considerations it matters not whether Bayuga or the General Counsel believe that the discipline was too harsh.

Contrary to the argument of the General Counsel, I do not find that Respondent in contacting Bayuga to support its defense of this case evidenced consciousness of guilt.

2. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

I find that the General Counsel has not established a prima facie case that Thoren was discharged for any reason other than the safety violations of August 2. The principal issue concerns motivation. The General Counsel must establish that the employment action was motivated by Thoren's protected activities. One of the elements in determining whether the General Counsel has made a prima facie showing is whether it has demonstrated that animus exists on the part of the Respondent. *Salem Paint, Inc*., 257 NLRB 336, 339–340 (1981). No such showing has been made on this record. First, all the employees signed the petition. The only distinguishing factor concerning Thoren was that his fax machine was used. Respondent knew that Pasteris was the author of the employee petition. On the day it received the petition, Respondent learned that Pasteris had written the letter, circulated it among the employees, and then sent it to Respondent and certain of its competitors. Not only did Respondent not retaliate against Pasteris, but it refused to let him go when he offered to replace a laid-off employee. The promotion of A. R. Smith provides further evidence that Respondent did not exhibit animus against employees who signed the letter.

Respondent could discharge Thoren for any reason so long as its motivation was not tainted by unlawful considerations such as Thoren's protected activities. Here, prior to the employee petition, Bayuga cited Thoren for four safety violations. Thoren was replaced as supervisor of the demolition team. However, the matter did not end there. Thoren raised the matter with Respondent's president, Richard Dugger. Dugger wrote back stating that the matter would be further investigated by Donovan. In fact, statements were obtained from supervisors regarding the coveralls question. Thus the process that led to the discharge had begun prior to any protected activity. When Donovan returned from his leave the process continued and three managers, Donovan, Kitzmiller, and Lombardo recommended that Thoren be terminated. Thus, Respondent has established reasonable grounds for discharging Thoren.

The General Counsel argues that Kerr and not Thoren should have been disciplined for the safety violations. However, Respondent held Thoren responsible for the demolition team and the demolition range. Thoren acknowledged such responsibility in his letter to Dugger. It should also be noted that Kerr was reassigned to a smaller and less prestigious job. I find that Respondent held Thoren responsible for the activities on the demolition range, and I cannot substitute my judgment for that of Respondent.

The General Counsel argues that Thoren was treated differently from other employees involved in safety violations. The record shows that Thoren was treated differently. I find that he was treated differently, however, not because of the use of his fax machine or other concerted activities but rather because he wrote the company president arguing that Anelle and Kerr should have been held responsible for the safety violations on the demolition range. Respondent's president ordered an investigation prior to any concerted activity and received a recommendation to discharge Thoren from three managers. The General Counsel does not contend, and I cannot find, that in writing the letter protesting his demotion from supervisor of the demolition team, Thoren was engaged in protected concerted activities. The totality of the evidence points to the conclusion that Respondent discharged Thoren as a result of the safety violations cited by Bayuga and the ensuing investigation instigated by Thoren's letter to Dugger.

Based on the minimal amount of protected activities, lack of animus against concerted activities, and the timing of these events, I find that the General Counsel has failed to establish a prima facie case that Respondent discharged Thoren because of his protected concerted activities. Assuming arguendo that the General Counsel has established a prima facie case, I find, for the reasons stated above, that Respondent has established its burden that it would have terminated Thoren in the absence of any protected conduct because of the safety violations of August 2 and the investigation thereof which began on August 8. Accordingly, I find that the complaint allegation that Thoren was discharged because of his protected concerted activities must be dismissed.

3. Thoren's supervisory status

Respondent contends that Thoren was a supervisor within the meaning of Section 2(11) of the Act. The General Counsel contends that Thoren had no supervisory authority. For the reasons expressed below, I find that Thoren was a statutory supervisor and that the complaint allegation regarding his discharge must be dismissed for this reason as well.

Under the work plan that governs Respondent's jobsite at Fort Ord, UXO supervisors have the following job description:

> Supervises UXO specialists and other employees assigned to perform such ordinance sweep, excavation, and demolition team members. Assures personnel conduct operations in accordance with established work and safety plan. Gathers data and records team daily activities and provides information to the Sr. UXO Supervisor. Monitors team members to confirm safety equipment is serviceable and properly used.

With regard to Thoren's position as supervisor of the demolition team the work plan states:

> The Demolition Range activities shall be under control of an experienced and trained UXO supervisor charged with the responsibility for all activities within the area. The supervisor shall be responsible for training all operators regarding the nature of the materials handled, the hazards involved and the precautions necessary, etc.

Due to the dangers involved in handling explosives, the job was structured so that UXO supervisors had complete au-

thority in the field to insure that the work was performed in accordance with the work plan. The work was performed by approximately 10 teams of 4 or 5 employees scattered over a 28,000-acre area. The project manager did not go into the field and the senior UXO supervisor only visited the field for brief periods to speak with the UXO supervisors. The supervisors had authority to write evaluations of their employees, which evaluations were used in deciding whom to promote to supervisor. As mentioned earlier, the UXO supervisors earned 18 percent more per hour than the specialists on their teams.

As the General Counsel correctly points out, Thoren did not hire, fire, discipline, lay off, recall, promote, evaluate, transfer, grant overtime, or resolve employee grievances. The principal question is whether Thoren responsibly directed the employees in the performance of their work.

Thoren admitted that he was ''in charge'' of his crew and that he was responsible for making sure that work was performed safely and in accordance with the work plan. He also admitted that he could make effective recommendations about firing or transferring employees. Thoren's letter of August 6 to Dugger stated that Thoren ''authorized'' his team to remove their protective clothing, that the decision was his responsibility, and that he got Moraitis reinstated because the safety violation was Thoren's and not the employee's. Thoren asserted, ''[W]hen I accepted the position and pay as team leader I also accepted the responsibility'' and he acknowledged that ''I am the one expected to take full responsibility for everything that occurred on the demolition range.'' Thoren understood, and I find, that he was responsible and in charge of the demolition operation. He was responsible for the production, safety, and supervision of the employees on the demolition team and, therefore, a supervisor within the meaning of the Act.[7] In addition Thoren had the authority to effectively recommend discipline and promotions and he effectively recommended that Moraitis' discharge be rescinded. Accordingly, even if the General Counsel had established that Thoren's discharge was motivated by protected concerted activities, the complaint allegation would still be dismissed because Thoren, as a statutory supervisor, was not protected by Sections 7 and 8 of the Act. *Parker Robb Chevrolet*, 262 NLRB 402 (1982).

C. *The Independent 8(a)(1) Allegations*

1. The alleged impression of surveillance

On Friday, August 19, Thoren attended a meeting at the Union's offices in Salinas, California. Many of the employees attended this meeting. The fact that such a meeting was going to be held was well known to all of Respondent's UXO specialists and supervisors. The UXO specialists and supervisors were staying at the same motel complex near Fort Ord. Respondent paid a per diem and for lodging. Respondent also paid, at certain times, for the employees to return home on leave. On Sunday, August 21, Thoren saw Kerr at a local bar frequented by the UXO specialists and supervisors. Kerr asked Thoren the general question, ''[W]hat's going on.'' Thoren replied that he and other employees had attended a meeting at the union hall. Kerr simply responded, ''Yeah, I know.'' I find no violation in this conversation. Kerr in no way indicated that Respondent kept the union activities of its employees under surveillance or that Respondent would take action against employees for such activities. He simply responded that he knew of union activities which employees had taken no steps to conceal. Kerr's casual comment, when viewed in light of the fact that the employees had been open in their union activities, did not constitute a violation of Section 8(a)(1) of the Act. See *Ohmite Mfg. Co*., 217 NLRB 435 (1975); *Carrick Foodland*, 238 NLRB 568 (1978); *Baker Mfg. Co*., 269 NLRB 794 (1984).

After receipt of the employee petition complaining about wages and benefits, Dugger, on August 6, wrote the employees expressing his displeasure that the employee petition had been sent to Respondent's competitors. In his August 25 letter, Dugger asserted that the employees behind the letter were misguided and that Dugger specifically knew who had authored and sent the letter. Dugger stated, ''In fact we now believe that the vast majority of those involved have seen fault with their actions and wish they had not participated.'' As in most cases, there were but a few who actually authored the letter and directed sending the letter to the competition. They know who they are, and so do I. I find that such statements tend to lead employees to believe that their concerted activities have been placed under surveillance and that Respondent has a reason for doing so. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act.

2. The prohibition against discussing benefits

As a condition of employment, Respondent employees are required to execute a nondisclosure agreement promising not to disclose proprietary and confidential information to anyone outside UXB. The agreement further states that any employee who discloses confidential information will be subject to disciplinary action.

During September, Respondent distributed a memorandum announcing the implementation of a medical and dental insurance program and describing the benefits available under the program. The memorandum contained the statement, ''The information contained on this page is confidential and subject to the nondisclosure provisions of your employment agreement.'' Thus, reading the nondisclosure agreement with the memorandum concerning medical and dental insurance, employees are prohibited from discussing the medical and dental benefits with the Union under penalty of discipline. Such a rule, which tends to inhibit employees from banding together to seek union assistance regarding such benefits, violates Section 8(a)(1) of the Act. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Communications Workers of America Local 9509*, 303 NLRB 264 (1991).

3. The alleged threats of job loss and blackballing

In a letter to employees dated November 7, Bobby Diekmann, senior UXO supervisor, asked the question, ''If the Union is voted in would that make it harder for UXB to compete for work at Fort Ord?'' In answering that ques-

[7] My finding that Thoren was a supervisor over the demolition team is independent of the Regional Director's determination that the UXO supervisors were not true supervisors within the meaning of the Act. I find only that as supervisor of the demolition team Thoren was a supervisor who used independent judgment in responsibly directing the employees on his team regarding their assignments, production, safety, and all aspects of the demolition process.

tion, Diekmann made the following statement alleged to constitute a threat:

> The short of it is, bringing a union into the picture in a competitive bidding situation like ours is nothing less than economic suicide. In my opinion, if the Union is voted in, UXB will lose the contract at Fort Ord, and all of us will be out of a job if that happens.

In a November 9 letter Diekmann stated:

> If the Union is voted in here, have you given any hard thought to how that could impact your long term ability to continue working in the industry after this project is done? When this project ends and we all go home to wait for someone to call with an offer of employment on another project, who do you think will call? UXB will certainly do what the law requires, but what about the other companies that do this kind of work? If we bring in a union here, which of our competitors will want to hire us to cause the same harm to their business? The Union may tell you that it would be illegal for a company to refuse to hire you just because of union activities at UXB, but our competitors aren't naive, and there are usually good reasons to hire someone else.

Respondent contends that Diekmann's letters were privileged by Section 8(c) of the Act that provides:

> [E]xpressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

However, an employer's rights under Section 8(c) cannot outweigh the rights of employees granted under Section 7 of the Act. Thus, the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617–619 stated:

> [An employer] may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 274 fn. 20 (1965). If there is any implication that an employer may or may not take actions solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that ''[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, eventuality of closing is capable of proof.'' 397 F.2d 157, 160 As stated elsewhere, an employer is free only to tell ''what he reasonably believes will be likely economic consequences on unionization that are outside his control,'' and not ''threats of economic reprisals to be taken solely on his own volition.'' *NLRB v. River Togs, Inc*., 382 F.2d 198, 202 (C.A. 2d Cir. 1967).

Diekmann offered no objective evidence that the Union caused harm to Respondent's business or would cause harm to its competitors. Diekmann did not seek to explain his remarks in terms of an economic prediction based on objective facts. Thus, I find that Diekmann's remarks constituted unlawful threats in violation of Section 8(a)(1) of the Act. *Dominion Engineered Textiles*, 314 NLRB 571 (1994); *Shelby Tissue*, 316 NLRB 646 (1995).

Respondent relying on *CPP Pinkerton*, 309 NLRB 723 (1992), argues that Diekmann's letters merely constitute a statement of opinion concerning possible third party action. However, Diekmann's statements are not mere opinions but rather predictions phrased in terms of what ''will'' and ''would'' happen if the Union won the election. In *Pinkerton* the comments found lawful were phrased in terms of what ''could'' and not what ''would'' occur. See *CPP Pinkerton*, supra at 724. See also *Buck Brown Contracting*, 283 NLRB 488 (1987); and *BI-LO*, 303 NLRB 749 (1991).

4. The alleged interrogation

James Moraitis testified that in a telephone conversation with Lombardo he told Lombardo that he believed his layoff was a result of his union activities. According to Moraitis, Lombardo responded by asking how Moraitis had voted in the representation election. I found Moraitis not to be credible or trustworthy witness and do not credit his testimony when it is in conflict with other witnesses. I credit Lombardo's testimony that Moraitis both brought up the subject of the Union and volunteered that he had voted for the Union. I, therefore, find no credible evidence to support this allegation of the complaint.

D. *The Representation Proceeding*

1. The ballots of Wilson and Lee

The Regional Director directed an election in the following appropriate bargaining unit:

> All full-time and regular part-time UXO ''supervisors,'' UXO specialists, UXO assistants, site safety officers, quality control officer and laborers employed by the Employer at its Fort Ord, California project; excluding office clerical employees, guards, and supervisors as defined in the Act.

The Union challenged the ballots of R. M. Wilson and Tom Lee. The Union contends that UXO Supervisors Wilson and Lee should not be included in the bargaining unit because they do not work on the Fort Ord project. Wilson and Lee were working under a subcontract Respondent had with an environmental contractor at Fort Ord. The status of the employees working under the environmental contract was litigated in the representation case. However, the Regional Director's decision made no express determination regarding these employees. The Union reads the unit description as excluding the employees working under that subcontract be-

cause Respondent treated the subcontract as a separate project. Respondent argues that the Regional Director did not limit the unit to the Corps contract but cited the Fort Ord location. The Regional Director's decision distinguished between Fort Ord and other job locations throughout the country but did not expressly include or exclude the employees working on the environmental subcontract. In finding that laborers should be included in the bargaining unit, the Regional Director stated that this was not a ''technical unit'' but instead a ''project unit.'' I find that the Regional Director was finding a unit for this Corps project, not other company projects and only for the term of this project.

The environmental contract had a separate project number and separate supervision. Wilson and Lee reported neither to the supervision on the Fort Ord project or to the Corps representative. Rather Wilson supervised Lee and reported directly to a vice president in Respondent's Virginia headquarters. The environmental subcontracts are under a separate division of the Company from the Corps contracts. Wilson and Lee performed work similar to that performed by the employees under the Corps contract. The main function of Wilson and Lee was to safely escort personnel on the site. This included detecting ordinance and the clearance of designated areas. They required the same skills and training certificates as the unit employees. However, due to the fact that Lee and Wilson were escorting personnel untrained in ordinance, they were required to keep a safe distance away from the personnel working under the Corps project.

Wilson and Lee worked the same schedule as the other employees and received the same benefits. Lee was paid more than the UXO supervisors on the Fort Ord project and Wilson was paid more than Lee. They worked under personal employment contracts similar to those between Respondent and the unit employees. Four of the employees working under Corps contract had also worked under the same environmental subcontract. When Lee and Wilson conclude their work on this jobsite they will go into the same labor pool as the employees working under the Corps contract. However, on this job they had little or no contact with the Corps project.

Based on the fact that Respondent treated the environmental contract as a separate project and Wilson and Lee reported directly to headquarters and were not supervised by the managers at Fort Ord, I find that the employees working under the environmental contract were a distinct group working on a separate contract and project. Accordingly, I find that Wilson and Lee did not share a community of interest with the unit employees and recommend that the challenges to their ballots be sustained.

2. The eligibility of the six laid-off employees

As stated above, employees John Clifford, Forrest Irvin, James Moraitis, Dan Poundstone, Michael Slovak, and Jeffery Ware were laid off on October 6, 1994. The Corps had directed Respondent to lay off two teams of UXO specialists and replace them with laborers from the local area. This change resulted in substantial savings in labor costs. The UXO specialists were offered the opportunity of remaining on the job as laborers, but all six declined the offer. Michael Maddux, a UXO specialist, chose to remain as a laborer. Maddux was later reinstated to a UXO specialist when a position opened due to the unexpected discharge of an employee.

As the Board stated in *Madison Industries*, 311 NLRB 865, 866 (1993):

> It is well established that temporarily laid-off employees retain their status as employees and are eligible to vote. Their eligibility depends on whether objective factors support an employee's reasonable expectancy of recall in the near future. The Board looks at several factors to determine whether a laid-off employee has a reasonable expectancy of recall, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. See, e.g., *S & H Concrete*, 274 NLRB 895 (1985).

At the time of the layoffs, Respondent had no expectation of recalling the employees in the future. The Corps had directed the layoffs in a move shifting work from the higher paid UXO specialists to the lower paid laborers. There was nothing in Respondent's history which indicated a need for more UXO specialists at this project. Neither the Corps nor Respondent had future plans which would require more UXO specialists for this project. The employees were told to keep in contact regarding future work. The understanding was that employees would be assigned to other projects, if and when there was work available. Employees could be recalled to this jobsite if unexpected openings arose. However, Respondent had no foreseeability of needing additional or replacement employees for this jobsite. I find that the employees had a reasonable expectation of recall to work by Respondent but not a reasonable expectation of recall to this jobsite. The fact that one or a few employees were later recalled does not establish those laid off in reductions in force had reasonable expectations of rehire at the time of the election or soon thereafter. *Zatco Metal Products Co*., 173 NLRB 27 (1969); *Apex Paper Box*, 302 NLRB 67 (1991). I find, therefore, that the employees did not have a reasonable expectation of recall to this bargaining unit. Accordingly, I shall sustain the challenge to their ballots.

As indicated above, I have found that Thoren was lawfully discharged prior to the election and I, therefore, sustain the challenge to his ballot.

3. The objections to the election

Having concluded that Respondent, between the date of the petition and the date of the election, engaged in violations of Section 8(a)(1) by threatening employees with the loss of employment or blacklisting and prohibiting employees from discussing medical and dental benefits with the Union, I find that Respondent's conduct affected the results of the election. Such conduct constitutes grounds for setting aside the election. *American Safety Equipment*, 234 NLRB 501 (1978); *Dayton Tire & Rubber*, 234 NLRB 504 (1978). Based on my rulings regarding the challenged ballots, however, a majority of the votes has been cast in favor of union representation and I recommend that the election results be certified.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the purposes and policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By creating the impression that it kept its employees protected concerted activities under surveillance, Respondent violated Section 8(a)(1) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of employment, blacklisting, or other reprisals for engaging in union activities, and by prohibiting employees from discussing medical and dental benefits with the Union.

5. By the conduct set forth above in paragraph 4, Respondent has illegally interfered with the representation election conducted by the Board between November 7 and 21, 1994.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, UXB International, Inc., Chantilly, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of employment, blacklisting, or other reprisals for engaging in union activities.

(b) Prohibiting employees from discussing medical and dental benefits with the Union.

(c) Creating the impression that it kept its employees protected concerted activities under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities in Fort Ord, California, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by a responsible representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director in writing within 20 days from the date of the Order what steps Respondent has taken to comply.

[8] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of employment, blacklisting, or other reprisals for engaging in union activities.

WE WILL NOT prohibit employees from discussing medical or dental benefits, wages and hours, or working conditions with the Union.

WE WILL NOT create the impression that we keep the protected concerted activities of our employees under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

UXB INTERNATIONAL, INC.